

90-5721 (8)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

No. _____

PERVIS TYRONE PAYNE,

Petitioner,

VS.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TENNESSEE

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(c) Character Use and Disposition of Instructions.

In the trial of all felonies except where pleas of guilty have been entered, every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury as it shall be taken to the jury room by the jury when it retires to consider its verdict. The jury shall have possession of the written charge during its deliberations; and after the jury's deliberations have been concluded, the written charge shall be returned to the judge and filed with the record, but need not be copied into the minutes.

Federal Rule of Evidence 403 18

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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Petitioner, Pervis Tyrone Payne, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Tennessee entered on the 16th day of April, 1990.

OPINION BELOW

The opinion of the Tennessee Supreme Court is reported at 701 S.W.2d 10 (1990) (Appendix A).

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on April 16, 1990. There was no petition for rehearing. Petitioner requested by motion an extension of time in which to file this

petition, and Justice Scalia, on June 28, 1990, signed an order extending petitioner's time to file this petition to and including September 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution:

Section 1. All persons born unnaturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Tenn. Code Ann. 39-2-203 (1987 Supp.) 4,7,8,18,35

Tenn. Code Ann. 39-13-204(g)(2)(B) (1990 Supp.) 4

STATEMENT OF THE CASE

QUESTIONS PRESENTED

I.

Whether the introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty?

II.

Whether the introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied Petitioner's rights under the Eighth and Fourteenth Amendments.

III.

Whether a jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.

Pervis Payne, a twenty year old, border-line retarded black man, with no previous criminal record, was sentenced by a jury to death pursuant to an instruction that imposed upon him the burden of proving that mitigating evidence outweighed the aggravating circumstances of the offense. The effect of this instruction was to prevent the jury from making an individualized determination of whether death was the appropriate penalty under all of the circumstances. The Tennessee statute¹ that authorized this jury instruction was repealed and amended, effective November 1, 1989.²

Petitioner's sentence was imposed by the jury after it heard proof offered by both the prosecution and petitioner during the sentencing portion of petitioner's bifurcated trial. The only proof offered by the prosecution during the sentencing phase

¹Tenn. Code Ann. 39-2-203(g) (1987 supp.) (Appendix B).

²The statute was replaced by a new death penalty statute, which requires that the jury "unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances." Tenn. Code Ann. 39-13-204(g)(2)(B). (Appendix C).

The new statute no longer requires the defendant to prove that the mitigating circumstances outweigh the aggravating circumstances. More importantly, under the former statute, if the aggravating circumstances were equal to the mitigating circumstances, the jury was required to return a sentence of death. Under the new statute, before returning a sentence of death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances; therefore, if the mitigating and aggravating circumstances are in equipoise, the jury would be required to return a sentence of less than death.

consisted of (1) a video tape of the crime scene that was so inflammatory that the trial judge indicated that it would not have been admissible in the guilt phase of petitioner's trial (T.1493-94) and (2) victim impact evidence of precisely the type that was condemned by this Court in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, (1987) and South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207 (1989).³ In addition, the prosecution supported its case for the death penalty with an argument that highlighted the victim-impact aspects of the offense and that invited the jury to draw inferences about the victim impact for which there were no evidentiary support.

Petitioner was convicted of the first degree murder of Charisse A. Christopher, a 28 year-old white woman, and her two year old daughter, Lacie Jo Christopher, and of the assault with intent to commit murder in the first degree of Nicholas Christopher, Mrs. Christopher's three year old son. All three victims received multiple stab wounds.

Petitioner pled not guilty to all charges. At trial, the prosecution established, as part of its case-in-chief, petitioner's presence at the scene. Testifying on his own behalf, petitioner admitted being in the victims' apartment shortly before the offense, but denied that he had stabbed the victims. Petitioner testified that, on his way to his girlfriend's apartment, located

³Although petitioner's trial was more than a year before this Court's decision in Gathers, these decisions (Booth and Gathers) should apply retroactively following this Court's holding in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987).

on the same floor as that of the victims, he passed an unidentified black man descending the steps from the victims' apartment. Petitioner further testified that the door to the Christopher apartment was ajar and that he heard a baby crying inside. When he entered the apartment, he found Charisse Christopher with a knife protruding from her throat (T.1215-1222).

The prosecution presented evidence from which the jury could conclude that petitioner had been in the victims' apartment prior to the stabbings; that petitioner had earlier that day purchased and injected cocaine (T.889-890); and that he committed the attacks as part of a drug-induced frenzy that may have, at least in part, been sexually motivated (T.691).

At the conclusion of the guilt phase of the trial, the jury found petitioner guilty as charged (T.1485-87). The jury then retired to the jury room before the sentencing phase. Out of the presence of the jury, just prior to the commencement of the sentencing hearing, the prosecution requested permission to introduce a video tape of the crime scene that had been taken over an hour after the discovery of the crime (T.1489).⁴ (Exact copies of the video tape have been included as Exhibit 1 to this petition.) The prosecution argued that the tape was relevant to show the heinous, atrocious, and cruel nature of the offense (T.1490). The commission of an offense in a manner fitting this

⁴ The record indicates that Officer C.E. Owen received a call at 3:23 p.m. informing him of a disturbance at 4516 Biloxi Street, Millington, Tennessee, the apartment of the victims (T.670). As the tape itself indicates, it was not made until 4:26 p.m.

description is one of the aggravating factors that, under the then-applicable Tennessee statute,⁵ required the jury to impose the death penalty unless the defendant proved to the jury's satisfaction that the aggravating factor was outweighed by mitigating evidence. Petitioner's trial counsel objected on the grounds that the tape was "simply an inflammatory color photograph" of the scene, which the jury had already seen through black-and-white photographs introduced during the guilt phase (T.1491), and that it should not be shown to the jury "because of its highly inflammatory effect" (T.1492).

After viewing the tape, the trial judge ruled it admissible (T.1493-94). The trial judge indicated that the tape would not have been admissible during the guilt phase due to its inflammatory nature; however, he felt that Tennessee's death penalty statute commanded him to admit, in the sentencing phase, any evidence that had any probative value whatsoever (T.1493-94).⁶

⁵Tenn. Code Ann. § 39-2-203 (Appendix B).

⁶The portion of the statute to which the trial court referred is Tenn. Code Ann. § 39-2-203(c), which provided:

In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so

At the sentencing hearing, the prosecution, prior to showing the tape, offered the brief, but emotional, testimony of Mary Zvolanek, the mother and grandmother of the victims. Ms. Zvolanek testified that the deaths of his mother and sister had had a devastating effect upon Nicholas:

Q. Ms. Zvolanek, how has the murder of Nicholas' mother and his sister affected him?

A. He cries for his mother. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him Yes. He says, I'm worried about my Lacie (T-1504-05).

The prosecution then concluded its proof with the display of the first two minutes of the video tape (T.1507).⁷ The tape exhibited by the prosecution showed the crime scene, including the bodies of the two dead victims. Charisse's hands and face revealed the effects of rigor mortis, and the tape focused on these particular features for several seconds at a time, sometimes with "close-ups." More particularly, the tape shows, in sequence, a wide angle shot of Charisse and Lacie Christopher lying on the floor in a pool of blood; approximately a five second close-up of

admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Tennessee (Appendix B).

⁷The prosecution chose not to show the remainder of the tape because, in the prosecution's view, only the first two minutes of the tape were relevant to the sentencing issue (T.1490-91).

Charisse's blood soaked body with emphasis on the puncture marks in her clothing; and a close-up (approximately five seconds) of Lacie, emphasizing her eyes and the puncture mark in her back. The tape then shows the wall and kitchen appliances covered with blood. Then it focuses back on Charisse with emphasis upon the effects of death (rigor mortis, swollen limbs, open mouth and eyes). Finally, the tape returns to Lacie, emphasizing the vivid contrast between the large knife and her small foot.

The prosecution's dramatic reference to the tape in closing argument sought to connect the victims' features, as depicted in the film, with the "depravity" of the conduct:

Now the first two minutes of video tape wasn't just shown because it's in color and looks a whole lot more gory. It's because it shows more detail and more accurately what we're talking about in the first stage of the trial. And while, perhaps I couldn't refer to it in voir dire, you remember when I asked you in voir dire could you listen to that kind of proof, that you were going to hear some rather graphic evidence of wounds. Well, that's what I was talking about.

You see, because that's not something I want to spring on somebody without warning them on the front end, even though it was a week ago. Because it shows very graphically how atrocious this crime was, how cruel it was, and how much depravity it showed. Some of the details especially in that picture -- in that videotape, you can't see as well as in the black and white picture. For instance, Charisse's right hand all gnarled up in agony. And Lacie Jo's hand and Lacie Jo's eyes and the expression on her face some people refer to as the thousand yard stare because it's

just sort of not focused (T.1574-75) (emphasis added).⁸

No foundation had been laid, of course, for the argument that Charisse's "gnarled" hand reflected her "agony" at death or that the expression on the child's face was relevant to show the nature of the killing.

The jury had previously, during the guilt phase, learned of the number and location of each victim's stab wounds, seen photographs of the deceased victims, and heard from the surgeon who operated on Nicholas a detailed description of the boy's life-threatening wounds. To the extent, therefore, that the results of the offense were relevant to show the heinousness, cruelty and depravity with which the killer acted, those results had been amply demonstrated by evidence other than the tape.

Following the display of the tape, the prosecution rested, and it thus became petitioner's task, in order to save his life, to offer mitigating evidence that outweighed the aggravating circumstances. He offered evidence that he had no prior record; that he had been a hard and diligent worker; and that he had never been a trouble maker in school. Petitioner also called a clinical psychologist, who testified as to petitioner's low I.Q. scores, which he considered "significant." He would not, however, describe petitioner as "retarded," indicating that "retardation" is "not commonly used any more." He described petitioner as one of the

⁸The first emphasized portion shows that the prosecution realized that the tape was inadmissible during the guilt phase.

most polite prisoners that he had ever interviewed (T.1508-30, 1551-71).

As previously noted, the prosecution, in its closing argument, invoked the grisly images depicted in the video tape. The prosecution also pointedly argued to the jury that it should consider the impact of the killings on the surviving child, Nicholas:

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his Baby Sister. (T.1576)

* * *

There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer. (T.1581)

On rebuttal to the argument by petitioner's counsel, the prosecution argued:

You saw the video tape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come to your mind, probably through the rest of your lives (T. 1591).

* * *

No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no, there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there - There won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby (T.1592-93).

* * *

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who love her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever (T.1594-95).

* * *

The prosecutor subsequently argued the value of the lost lives of Charisse and Lacie Jo:

Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives (T. 1596-97).

Having based its arguments (opening and rebuttal) almost entirely on the video tape and the victim impact evidence, the prosecution concluded with the following remarks:

Ladies and Gentlemen of the jury this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard

a lot about Charisse Christopher, Lacie Jo and Nicholas, and here they were as it appeared before Pervis Payne came into their lives. And this is what he did to them.

The Assistant District Attorney General then approached a large diagram of Nicholas Christopher's body and stabbed a hole through it with the butcher knife that was found at the crime scene. See State of Tennessee v. Payne, 791 S.W.2d 10, 20 (1990).

Following closing arguments, the trial judge instructed the jury on the criteria for imposing the death penalty (T.1597-1600) (Appendix D):⁹

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the State, beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found (emphasis added).

* * *

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. ... (Appendix D) [emphasis added].

⁹In accordance with Tennessee Rule of Criminal Procedure 30(c), the trial judge first gave the instructions orally from the bench and subsequently submitted them to the jury in writing for use during the jury's deliberation (Appendix D).

The verdict form submitted to the jury required the jury to identify any aggravating circumstances that it found. As returned by the jury, the verdict stated:

1. The murder was committed against a person less than twelve years of age and the defendant was fourteen years of age or older.
2. The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder.
3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(Appendix E)

Following the space provided for identification of aggravating circumstances, the form stated:

We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances or circumstances so listed above (Appendix E).

The Tennessee Supreme Court, in its opinion affirming petitioner's conviction and sentence, held that the admission of the video tape was not error. In that court's view, the tape was relevant to show that the murder was heinous, atrocious or cruel, and, in any event, its probative value outweighed any prejudicial effect. 791 S.W.2d at 19-20 (1990).

The court also held that Mrs. Zvolanek's testimony about the effect that the deaths of Nicholas' mother and sister had had upon him, while technically irrelevant, "did not create a

constitutionally unacceptable risk of an arbitrary imposition of the death penalty," and thus was harmless error. 791 S.W.2d at 17,

18. The court further ruled that the victim impact arguments made by the State during the sentencing phase were relevant to show petitioner's personal responsibility and moral guilt. The court's decision, the rationale for which is set forth in the following passage, is in direct conflict with this Court's decisions in Booth and Gathers:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims. 791 S.W. 2d at 19.

Though the court had harsh words for the prosecution's improper stabbing of the diagram, it held that this conduct was harmless error. 791 S.W.2d at 20.

REASONS FOR GRANTING THE PETITION

- I. The introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty.

Although we have attempted to describe what is depicted on the video tape (supra, p. 14-15), words really cannot impart its effect upon the viewer. Its horrifying impact can only be realized through viewing it. The tape, in effect, transported the jury to the Christophers' apartment one hour after the stabbing. A juror following the movement of the camera could not have helped but get the eerie feeling that he or she was standing in the room with the victims. Shortly after their "walk" through the apartment, the jury was called upon to decide whether petitioner should live or die.

Our argument necessarily consists of two parts. First, we explain that the tape should never have been admitted into evidence. Second, we show that the introduction of the tape violated petitioner's rights under the Eighth and Fourteenth Amendments.

A. The Video Tape Was Inadmissible.

The video tape was inadmissible for two reasons. First, it was not relevant for the purpose for which the prosecution invoked

it in closing argument (T.1574-75). Second, any marginal probative value that the tape might have possessed so substantially outweighed by its prejudicial effect that its exhibition to the jury denied petitioner his rights under the Eighth Amendment.

No foundation was, or could have been, laid to permit the jury to find that the particular emotion-inducing details on which the prosecution focused -- the "gnarled hands" and the child's "stare" -- were relevant to show the "heinousness" or "depravity" of petitioner's conduct. The heinousness of the conduct that produced these tragic results was hardly in dispute in any event. For all that appears in the record, the shocking stares that appear in the eyes of the two murder victims may be common to virtually all deaths. Be that as it may, the victims' appearance one hour after death, when rigor mortis had already set in, tells the jury nothing about the heinousness of that conduct.

Assuming arguendo that the display of those aspects of the scene not distorted by the passage of time following death were relevant to show the heinousness of the conduct, the tape's prejudicial effect nonetheless substantially outweighed its marginal probative value. There was no need to provide the jury with a two minute exhibition of the effects of rigor mortis in order to make them aware of the nature of the offense. The jury had, after all, seen black and white photographs of the scene and of the victims and had heard several witnesses give graphic, detailed descriptions of the number, location and effect of the stab wounds.

That the tape's prejudicial effect outweighed whatever marginal relevance it may have possessed was apparently understood by the trial judge, who stated that, though the tape may not have been admissible during the guilt phase, it was admissible during the sentencing phase of the trial (T.1493). Taking virtually an "anything goes" approach in the sentencing phase, the trial judge seemingly considered himself to be under a statutory command to admit any evidence having any probative value, without regard to whatever prejudicial effect the evidence might possess (T.1493).¹⁰

Lest the Court believe that petitioner seeks to constitutionalize F.R.Evid. 403 in every death penalty sentencing trial, we quickly note that petitioner only seeks redress of the denial of his right to have the jury make a reasoned, moral judgment about whether he lives or dies. There can be no doubt, we respectfully submit, about the inadmissibility of the tape. The sole issue will be whether its introduction had the capacity to divert the jury's attention to the extent that there was a reasonable likelihood that the jury did not make the reasoned, moral judgment that the Eighth Amendment requires.

¹⁰The Tennessee statute by which the trial judge felt commanded to permit the introduction of any relevant evidence was Tenn. Code Ann. § 39-2-203(c), which is quoted supra, note 6.

B. The Erroneous Introduction of the Video Tape Deprived Petitioner of His Rights Under the Eighth and Fourteenth Amendments.

Establishing the inadmissibility of the tape -- either because of its complete lack of relevance or because any marginal relevance it might possess would be outweighed by its prejudicial effect -- does not, of course, end the argument. Petitioner must, and can, also show that the introduction of this inadmissible evidence violated the Eighth Amendment's prohibition of cruel and unusual punishment. It is, we acknowledge, one thing to determine that the state courts have made an erroneous evidentiary ruling. It is quite another to conclude that the erroneous ruling contravened a specific provision of the Constitution.

The sentencer in a death penalty case must be allowed to perceive and treat the defendant "as a uniquely human being" and to make a "reliable determination that death is the appropriate sentence." Penry v. Lynaugh, 492 U.S._____, 109 S.Ct. 2934, 2947 (1989). As Justice O'Connor wrote in Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869 (1982) (concurring opinion):

Because sentences of death are "qualitatively different" from prison sentences, Woodson v. North Carolina, . . . this Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that would guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake (emphasis added).

Important to our analysis is an explanation of why a death sentence imposed out of passion conflicts with the specific terms of the Eighth Amendment. Merely showing that there are sound policy reasons why a death penalty should not be imposed out of passion avails petitioner nothing. We must, and can, demonstrate that prohibiting death sentences imposed out of passion serves one of the basic principles that the framers of the Bill of Rights sought constitutionally to preserve through the Eighth Amendment.

Two aspects of the framers' adoption of the Eighth Amendment must be considered in making this analysis. First, the framers sought to prohibit capital punishment when it is disproportionate to the particular offense for which the government seeks it. Second, the framers undoubtedly recognized that in most cases the trier of fact would have broad discretion to make the determination of whether a death sentence is called for by the facts of the case.

If we accept the proposition that the framers intended that the death penalty be imposed only when proportionate to the offense under consideration and if we further acknowledge their expectation that the sentencing decision would in most instances rest with the trier of fact, we can easily understand the limited, though vital, role that the courts must play if the Eighth Amendment's fundamental purposes are to be vindicated. Because the fact trier plays such an important role in implementing the Eighth Amendment's protection against disproportionate punishment, the fact trier's broad discretion must be guided, with minimum judicial interference, to ensure that the fact finder considers the evidence

properly bearing on the propriety of the sentence. Without such limited guidance, there is a constitutionally impermissible risk that the jury's decision will be based on factors not bearing on whether capital punishment is warranted by the facts under scrutiny. Delegating to the courts the limited role of ensuring that the fact trier's discretion is properly focused is, therefore, essential to the implementation of the Eighth Amendment's protection against disproportionate punishment.

Recognizing that the fact trier must receive sufficient guidance to make a reasoned, moral judgment on whether a defendant lives or dies, this Court has, for example, held that the Eighth Amendment requires that a defendant be given the opportunity to present mitigating evidence. Eddings v. Oklahoma, *supra*; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2754 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976).

This Court has also concluded that, just as proper guidance of the jury's discretion requires ensuring that the jury consider all relevant evidence, it also requires, in some instances, that certain matters be withdrawn from the jury's consideration. For example, the Court has held that a jury's discretion was improperly guided when a prosecutor implied that the jury would not have the final say on whether a defendant lived or died. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). The Court reversed the defendant's sentence in that case, because there was a constitutionally impermissible risk that the jury had imposed the death sentence for unwarranted reasons. Id.

More germane to the instant case, the Court has held that the introduction of prejudicial, inflammatory victim impact evidence prevented the jury from making the reasoned decision that the Eighth Amendment requires. Booth v. Maryland, *supra*; South Carolina v. Gathers, *supra*. While petitioner recognizes there is disagreement among the members of this Court over a state's authority to make victim impact evidence relevant, there is, we believe, no dispute about the fundamental proposition that the introduction of inadmissible, inflammatory evidence can so substantially divert the jury's attention that it is prevented from making the reasoned, moral judgment that the Eighth Amendment requires.

A death sentence that is "imposed out of whim, passion, prejudice or mistake," Eddings, 455 U.S. at 118, contravenes the fundamental principle that the imposition of capital punishment must not be disproportionate to the particular offense under consideration. Such a sentence, because of the likelihood that it is based on improper factors, carries with it the unacceptable risk that death is being imposed when it should not be -- i.e., in situations in which the death sentence is disproportionate to the nature and surrounding circumstances of the offense.

If the principle that a death sentence may not be imposed out of passion is to mean anything, the sentence imposed in this case must be reversed. The Eighth Amendment requires that a defendant facing capital punishment be given a meaningful opportunity to plead for his life to a jury capable of objectively considering the

evidence and arguments offered by both parties. Here, there was, to put it mildly, a reasonable likelihood that the showing of the video tape influenced the jury to the point that it could not make the requisite objective evaluation. More realistically, it is conceivable that a viewer of the video tape could take the two minute "walk" through the Christophers' apartment and still give meaningful consideration to any evidence offered by petitioner, much less the mitigating evidence which, by virtue of the order of the proof, petitioner was forced to offer immediately upon the heels of the display of the tape.

That a state may impose the death penalty for crimes of the type involved in this case is settled. It is conceivable, we acknowledge, that a properly guided jury, exercising the broad discretion afforded it under the Eighth Amendment, might perhaps conclude that petitioner should be executed, notwithstanding his youth, good work habits, previous accomplishments, and lack of previous criminal record. In this case, though, petitioner never was given the opportunity to plead for his life to a jury capable of objectively considering these mitigating factors and making the reasoned moral judgment required by the Eighth Amendment.

II. The introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied Petitioner's rights under the Eighth and Fourteenth Amendments.

While we are confident that the inadmissibility of the tape is a proposition all the members of this Court will readily accept, we, of course, make no such statement concerning the victim impact evidence. We are mindful that some of the members of this Court are of the view that exclusion of such evidence is not constitutionally required. Because the holdings of Booth and Gathers clearly condemn the introduction of victim impact evidence introduced by the prosecution in this case, petitioner's sentence must be reversed if those decisions are allowed to stand.

In its previous decisions in Booth and Gathers, this Court, though closely divided, has flatly held that evidence of the impact of a crime on its victims is irrelevant and therefore inadmissible in a proceeding in which the jury is asked to determine whether to impose the death sentence on a defendant. Gathers, supra, 490 U.S. at ___, 109 S.Ct. at 2211; Booth, supra, 484 U.S. at ___, 107 S.Ct. at 2533. Under the Court's holding in Griffith v. Kentucky, supra, those decisions should be applied retroactively. At the sentencing phase of petitioner's trial, his rights to an individualized, rational decision on the basis of his offense and his personal qualities was denied both through the introduction of the testimony of Charisse Christopher's mother and the arguments of the state's attorneys. In addition, the prosecution was not only permitted to introduce victim impact evidence and argue extensively

to the jury about the impact of the stabbings on Christopher, it was also permitted through the video and argument of counsel, to portray the impact in a fashion that was misleading and prejudicial.

A. The Tennessee Supreme Court Erroneously Held, Under the Circumstances of This Case, That the Victim Impact Evidence Introduced Through Nicholas Christopher's Grandmother Was Harmless Error.

The Tennessee Supreme Court acknowledged that the statements introduced through Mrs. Zvolanek, Nicholas Christopher's grandmother, were technically irrelevant and of the type that this Court condemned in Booth v. Maryland, supra. The court held, however, that this evidence was harmless error and did not create a "constitutionally unacceptable risk of an arbitrary imposition of the death penalty." 719 S.W.2d at 18. The court sought to distinguish Booth on the basis that the irrelevant information in Booth was more extensive and inflammatory than that introduced through Mrs. Zvolanek at petitioner's trial.

Booth and the subsequent case of Gathers v. South Carolina, supra, both stand for the proposition that the sentencing jury is supposed to focus on the moral culpability of the defendant and that victim impact statements improperly divert the jury's attention away from the defendant. While the victim impact statements introduced through Nicholas Christopher's grandmother were not of the "quantity" as those allowed by the lower courts in

Booth and Gathers, those statements, with the reemphasis by State's closing argument, were every bit as inflammatory.

A distinction based upon quantity in this context is unrealistic. Beyond a certain point, this type of evidence becomes cumulative and subsequent increments are irrelevant. The critical point is the initial shock when the jury is invited to respond emotionally to the tragedy effected by the death of the particular individual who is the victim in the case before it.

During the sentencing phase, the jury heard testimony that Nicholas cries for his mother and sister and asks his grandmother several times a week if she misses her. In her closing argument, the Assistant District Attorney General referred extensively to this evidence. She emphasized the sorrow and longing of Nicholas Christopher and, in effect, pleaded with the jury to sentence petitioner to death for Nicholas' sake.

In reaching its conclusion that Booth could be distinguished, therefore, the Tennessee Supreme Court concluded that the victim impact evidence was less harmful because it was not of the same quantity as that introduced in Booth. In so doing, the court failed to take into account the prejudicial effect of Mrs. Zvolanek's testimony. Moreover, and perhaps more significantly, the court mistakenly formulated a distinction based upon quantity only because it refused to place the prosecution's argument in the "victim impact" category.

B. The Tennessee Supreme Court Erroneously Held That the Victim Impact Statements Made by the State, During Closing Argument in the Sentencing Phase of Petitioner's Trial, Did Not Violate Either Booth or Gathers.

The Tennessee Supreme Court held that the victim impact statements made by the prosecution during closing argument in the sentencing phase of petitioner's trial were relevant to petitioner's personal responsibility and moral guilt. The court stated that:

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deed of defendant (as was in this case). Without limitation as to relevancy, but nothing may be said that bears upon the victims.

791 S.W.2d at 19. The court then concluded that the victim impact statements made by the State did not violate Booth or Gathers. 791 S.W.2d at 19.

Fairly read, the Tennessee Supreme Court's opinion, based apparently upon a misreading of Booth and Gathers, in this case squarely holds that victim impact statements are permissible in the sentencing phase of a death case. In so doing, the court rejected, sub silentio, this Court's holdings in Booth and Gathers.

In Gathers v. South Carolina, supra, the prosecutor read at length from a religious tract, "A Game Guy's Prayer", that the victim had been carrying at the time of his murder. The prosecution commented on the victim's personal qualities, which the prosecutor inferred from the religious tract and the victim's voter registration card. Relying upon Booth, this Court noted that

evidence of the victim's religious beliefs and prosecutor's statements regarding the victim's character were inadmissible for the purpose of determining the defendant's sentence in that they were irrelevant to his decision to kill. Gathers, supra, 109 S.Ct. at 2207.

In the instant case, the prosecution's closing argument encompassed almost every conceivable type of victim impact information. While the central theme of the State's argument was built on the effect the murders had, and would have, upon Nicholas Christopher, their argument also focused attention upon Charisse Christopher's "mother and daddy who loved her" and Lacie Christopher's "grandparents who are still here" and the effect the deaths would have upon them (T.1594-1595). In addition, the prosecution commented, without proof, that Charisse Christopher had lived an exemplary life. Under the law as it now stands, such statements are not permissible during the sentencing phase in a death case for the reasons stated in Booth and Gathers.

This case highlights still another reason, previously addressed in this Court's opinion in Gathers, for rejecting victim impact evidence in death cases. The prosecution took great liberties with the record in this case in a number of respects. As indicated in the statement of the case, the prosecution made extensive argument that was based upon the appearance of the victims over an hour after the crime without ever offering any evidence to show that the particular features to which he referred were a manifestation of the petitioner's acts. In addition, as

just noted, the prosecution also argued to the jury that Charisse Christopher had lived an exemplary life without any evidence in the record upon which to base such statements. Such evidence would not, of course, have been admissible under this Court's holdings in Booth and Gathers. If there were no prohibition of victim impact evidence, the prosecutors would undoubtedly be tempted to develop whatever evidence they could of the victim's good character, without regard to its trustworthiness. The defense attorney would then be left with the hopeless dilemma of either letting such evidence stand unchallenged or presenting an all out character attack upon a person who has just been shown to have been the victim of a homicide. No matter how truthful and well presented such an attack might be, it is hard to imagine a case in which the attack would not do the defendant more harm than good.

C. The Harmless Error Standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), Even if Applicable to a Capital Sentencing Case, Was Improperly Applied By the Tennessee Supreme Court.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), this Court held that certain violations of a person's constitutional rights at trial may nevertheless not render the conviction subject to reversal when the error is found to be "harmless beyond a reasonable doubt." Although the Court has recognized that some violations of constitutional rights may be so fundamental that they can never be harmless, see, e.g., Gray v.

Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) (violation of Witherspoon may not be harmless error), a majority of the Court in Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792 (1988), applied the Chapman standard in holding that the use, at a sentencing proceeding, of evidence obtained in violation of a defendant's constitutional rights was not harmless error beyond a reasonable doubt. In a separate concurring opinion, in which Justice Brennan and Justice Blackmun joined, Justice Marshall agreed that the judgment affirming a death sentence should be reversed. He insisted, however, that the majority had erred in applying the harmless-error analysis to the particular constitutional violation at issue. We submit that the reasoning of Justice Marshall's concurring opinion applies with even greater force to petitioner's case, in which constitutional error relates even more directly to the integrity of the verdict.

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), this Court held that a defendant formally charged with a capital crime had a constitutional right to consult with an attorney before submitting to a psychiatric examination conducted to determine the defendant's future dangerousness.

In Satterwhite, supra, the Court concluded, as had the Texas Court of Criminal Appeals, that the use of psychiatric testimony at the defendant's sentencing hearing had violated the defendant's rights under Estelle v. Smith, supra, 486 U.S. at ___, 108 S.Ct. at 1797. Applying the Chapman harmless-error test, the Court disagreed with the Texas Court of Criminal appeals and concluded

that the use of testimony obtained in violation of Estelle v. Smith was not harmless beyond a reasonable doubt.

Even if the Tennessee Supreme Court were correct in its conclusion that the harmless-error rule should be applied to a violation of Booth and Gathers, however, it erred in its conclusion that those errors were harmless beyond a reasonable doubt. As noted above, the evidence introduced in violation of petitioner's rights by the prosecution in this case was of a highly emotional, inflammatory nature. As the Court warned in Satterwhite:

It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

486 U.S. at ___, 108 S.Ct. at 1798. Although the Court then concluded that "a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury" id., it cited the critical nature of the issue on which the testimony was offered and reversed the sentence. In petitioner's case, the issue, whether the mitigating circumstances outweighed the aggravating circumstances, was also critical. In order to avoid a sentence of death, petitioner had the burden of proving that the mitigating evidence outweighed the aggravating circumstances charged by the prosecution. The improperly admitted evidence, however, was not just the testimony of a single witness. It was the testimony of

the mother/grandmother of the victims, and the misleading, inflammatory video tape, and the improper, factually unsupported, Gathers-violative closing argument of the Assistant District Attorney General. Should the Court apply the harmless-beyond-a-reasonable doubt standard to the violation of petitioner's rights shown here, the quantity and quality of the evidence and argument presented by the State at petitioner's sentencing trial could not be considered harmless violations of petitioner's rights under this Court's reasoning in Satterwhite.

III. The jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.

We have already seen that the fact trier's discretion must be properly guided in order to vindicate the Eighth Amendment's prohibition against disproportionate sentences (see discussion of Issue I, supra at pp. 20-21). The issue that we now raise asks a different question: What limits may a state constitutionally place on the fact trier's discretion?

It would appear that the parameters within which a state may limit the fact trier's discretion have already been set by decisions of this Court. A state may not, on the one hand, make the imposition of a death sentence mandatory for certain offenses. Woodson, supra. The Constitution does not, however, require that the fact trier have unfettered discretion to decline to impose the death penalty. Boyde v. California, 494 U.S._____, 110 S.Ct. 1190 (1990); Blystone v. Pennsylvania, 494 U.S._____, 110 S.Ct. 1078, 1081 (1990).

Nor is it unconstitutional for a State to place upon the defendant the burden of showing by a preponderance of the evidence that the mitigating circumstances are sufficiently substantial to call for leniency. Walton v. Arizona, ____ U.S._____, 110 S.Ct. 3047, 3055-56 (1990). Such an instruction still affords the defendant the benefit of the individualized assessment that the

Eighth Amendment requires since the jury's focus is properly on the question of whether "death is the appropriate penalty under all the circumstances." Boyde, supra, 494 U.S. at _____, 110 S.Ct. at 1195. With the exception of Justice Scalia (concurring opinion, 110 S.Ct. at 3058), the Court in Walton did not abandon its commitment to the principle that the Eighth Amendment requires an individualized sentencing determination in a capital case.

In Boyde, the challenged jury instruction, unlike the one in the instant case, did not make the success of the defendant's plea for his life dependent upon convincing the jury that the mitigating evidence outweighed the aggravating circumstances. After reminding the jury "to consider all applicable aggravating and mitigating circumstances," 494 U.S. at _____, 110 S.Ct. at 1194, the trial court had instructed the jury:

If you conclude that the aggravating circumstances outweighed the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweighed the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole (emphasis supplied by opinion).

494 U.S. at _____, 110 S.Ct. at 1195.

Rejecting Boyde's claim that this instruction deprived him of the requisite individualized assessment, this Court specifically pointed out that the California courts had construed the instruction to mean that it "could not permissibly require a juror to vote for the death penalty 'unless, upon completion of the 'weighing' process, he decides that death is the appropriate

penalty under all the circumstances"" (emphasis added) *Id.* What saved the instruction in Boyd from being held unconstitutional under Woodson and its progeny, therefore, is the fact that it allowed the jury to properly perform its intended role under the Eighth Amendment -- namely, the weighing of the evidence to determine whether, under all the circumstances, death is the appropriate penalty. *Id.*

The Tennessee statute in effect at the time of petitioner's trial¹¹ commanded, and the jury was instructed (T.1598-99), that if the jury unanimously determined "that at least one statutory aggravating circumstance or several statutory aggravating circumstances ha[d] been proved by the state, beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death." (emphasis added). A juror who thus believed that any of the aggravating circumstances existing here¹² "outweighed" the mitigating evidence offered by petitioner was required to vote to impose the death penalty, even

¹¹Tenn. Code Ann. § 39-2-203(g) provided:

If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death (Appendix B).

**

¹²The prosecution argued that three of the statutory aggravating circumstances were present: (1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years or older; (2) defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder; and (3) the murder was especially heinous, atrocious, or cruel, in that it involved torture or depravity of mind (T.1573).

though he might have felt that, under all the facts and circumstances of the case, defendant's life should be spared. Smith v. North Carolina, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982) (separate opinion of Stevens, S.) denying cert. to 305 N.C. 691, 292 S.E.2d 264 (1982). This limitation on the jury's discretion thus prevented the jury from playing the vital role the framers intended it to have in implementing the Eighth Amendment's prohibition against disproportionate sentences.

A weighing process that requires a defendant to prove that mitigating circumstances offset, or somehow are more important than, a statutorily identified aggravating circumstance deprives a defendant of the meaningful individualized assessment that the Eighth Amendment requires. Petitioner's jury was, in essence, asked to decide: Which is of greater significance -- the brutal stabbing of a mother and her two young children or the evidence concerning petitioner's youth, good work habits, lack of a previous criminal record and borderline retardation? A juror would be hard pressed, to say the least, to answer that question in petitioner's favor; yet, a juror could quite conceivably have determined that this one incident, horrible and tragic as it is, did not warrant taking petitioner's life. Irrespective of who bears the burden on the issue, the Eighth Amendment requires that the jury decide whether the mitigating circumstances call for leniency, not whether one category of evidence is superior to or "outweighs" another. Only then can one be certain that the jury is really deciding whether death is the appropriate penalty under all the

circumstances. The instruction given petitioner's jury created a constitutionally impermissible risk that some jurors voted for imposition of the death penalty even though they may have felt that all the circumstances warranted a sentence of life imprisonment.

Like the juries in Boyde and Walton, petitioner's jury should have been permitted to decide whether death was the appropriate penalty under all the circumstances. Boyde, 494 U.S. at _____, 110 S.Ct. at 1195. Because his jury was not permitted to exercise the discretion that the fact trier must have if the Eighth Amendment's prohibition against disproportionate punishment is to be given effect, petitioner's sentence must be reversed.

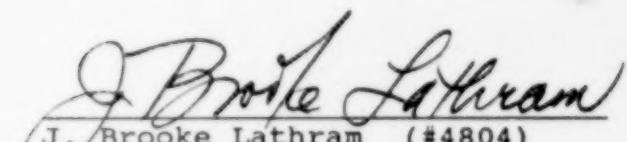
This Court's decision in Blystone v. Pennsylvania, supra, does not require a different result. When a defendant offers no mitigating evidence at all, the jury has no role to play in implementing the Eighth Amendment's protection against disproportionate punishment. When, however, a defendant does offer mitigating evidence, the jury, if the Eighth Amendment's purpose is to be carried out, must be given discretion to decide whether, under all the facts and circumstances pertaining to the defendant's particular case, death is the appropriate punishment.

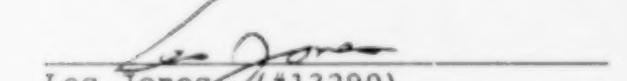
For the foregoing reasons, petitioner's sentence must be reversed.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,


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September 12, 1990 -

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing has been mailed, postage prepaid, to Charles W. Burson, Attorney General and Reporter, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025; and one copy to Norma Crippen Ballard, Esq., 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, this 12th day of September, 1990.

J. Brooke Latham

A P P E N D I X